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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 769

FRED A. HUGHES, ET AL.,

Appellants,

vs.

CADDO PARISH SCHOOL BOARD, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF LOUISIANA

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF LOUISIANA, SHREVEPORT DIVISION

Civil Action No. 1165

FRED A. HUGHES, ET AL.,

vs.

CADDO PARISH SCHOOL BOARD, ET AL.

OPPOSING JURISDICTIONAL STATEMENT AND MOTION TO DISMISS OR AFFIRM

Appellees' Statement as to Jurisdiction and Motion to Dismiss or Affirm

The appellees, believing that the matters set forth below will demonstrate the lack of substance in the questions raised by this appeal, file this, their statement in opposition to appellants' statement as to jurisdiction as amended. Appellees include herein their motion to dismiss the appeal or, in the alternative, to affirm the judgment of the District Court on the grounds that the questions raised on behalf of appellants are so unsubstantial as not to need further argument.

The unsubstantial character of the ground stated by appellants is so apparent on the face of the record as to

warrant the Court in summarily disposing of the appeal at this stage of the proceeding.

Appellees show that plaintiffs-appellants' pleadings are unsubstantial in that:

(1) They fail to set forth a right of action arising under the Constitution and laws of the United States.

(2) They fail to set up the deprivation, under color of any law, statute or ordinance of any state, of any right, privilege or immunity created by the Constitution of the United States, or of any rights created by any law of the United States providing for equal rights of citizens of the United States.

(3) Plaintiffs-appellants' complaint is lacking in substantiality because the questions attempted to be raised are controlled and foreclosed on the merits by settled doctrine as established in the case of *Waugh v. Board of Trustees of the University of Mississippi*, 237 U. S. 589, 59 L. Ed. 1131, 35 S. Ct. 720.
SEE ALSO: *Patterson v. Standard Oil & Gas Co.*, 305 U. S. 376, 83 L. Ed. 231, 59 Sup. Ct. 259; *Levering & Garigues v. Morrin*, 77 L. Ed. 1062, 289 U. S. 103; *Hannis Distilling Co. v. Baltimore*, 54 L. Ed. 482, 216 U. S. 285; *Del Pozo Y Marcos v. Wilson Cypress Co.*, 70 L. Ed. 172, 269 U. S. 82.

The matters herein relied upon by appellees are more particularly stated below:

History of the Case

The history of this case is:

(1) A committee was appointed by the Caddo Parish School Board in July 1943 to investigate the matter of secret societies in high schools.

(2) Only one high school out of ten in Caddo Parish had secret societies (Byrd High School).

(3) With continuing wide publicity, numerous hearings were had, each family in Byrd High School

(1700) was polled by letter, and in October 1943 the committee reported, finding secret societies to be detrimental in high schools.

(4) The School Board, basing its action on its investigation and the report of its committee and after consultation with the Attorney General and the State Board of Education, on the report from the poll showing that 85.3 per cent of the parents with children in Byrd High School found secret societies to be detrimental to the educational system, passed a resolution denying the holding of offices and honors in extracurricular activities to members of secret societies. This resolution was passed November 3, 1943 (see certified copy attached as part of defendants' Exhibit "A" to defendants' motion of lack of jurisdiction over the subject matter).

(5) The enforcement of this resolution was attacked in the State District Court by present counsel, representing fraternities and sororities, on the same grounds of unconstitutionality alleged in this case. A preliminary injunction was denied, and application was made to the Supreme Court of Louisiana for supervisory writs which was denied with the statement: "Application for writs denied—judgment correct," and after trial (inj. denied) on the merits that case is now pending on appeal to the Supreme Court of Louisiana, said case being entitled Amelia F. Cook et al. v. Caddo Parish School Board et al., No. 37,394 Supreme Court docket (see copy of original petition and plea of unconstitutionality identified as defendants' Exhibit "C" attached to defendants' supplemental motion of lack of jurisdiction).

(6) The Louisiana Legislature at its 1944 session passed Act 342 of 1944, setting forth the penalty of suspension or expulsion after a parish school board, in the exercise of its constitutional authority, had passed a resolution prohibiting secret societies.

(7) On September 6, 1944 the Caddo Parish School Board passed a resolution prohibiting fraternities and

sororities, under penalty of suspension or expulsion (as shown by copy of the resolution attached to appellants' amended jurisdictional statement). The School Board asserted its authority both under the resolution and under the Act.

(8) The enforcement of this resolution was attacked by present counsel in the case of O. G. Collins et al. v. Caddo Parish School Board et al., and a preliminary restraining order issued, (suit No. 90,387, First Judicial District Court, Caddo Parish, Louisiana). On hearing, the preliminary restraining order was recalled and the preliminary injunction refused. The lower court held that the School Board had full authority to pass the resolution and that it did not infringe upon any rights of the plaintiffs or their children. (See certified copy of Judge Galloway's opinion included in defendants' Exhibit "B", together with certified copy of *Plaintiffs' application for writs, and defendants' opposition* thereto, all attached to defendants' motion of lack of jurisdiction over the subject matter.) The same constitutional questions were raised in that suit as are raised in this. Writs were applied for to the Supreme Court of Louisiana which were refused with the statement: "Application for writs refused. No error of law in the ruling complained of." (Return on writs attached to defendants' Exhibit "B" supra.) (Writs refused by unanimous opinion in both the Cook case and the Collins case.)

(9) Thereupon, the same counsel obtained a temporary restraining order in the Federal District Court and filed this suit therein, based on the identical allegations as in the Collins case.

(10) Defendants-appellees herein filed a motion and supplemental motion of lack of jurisdiction over the subject matter, which were argued and briefed before a 3-judge court, said court sustaining the motion and supplemental motion aforesaid and dismissing plaintiffs' suit for lack of a Federal question.

From the above statement of facts and the matters hereinafter set out, it has been established by the Supreme Court of Louisiana that the local school board has authority to regulate secret societies. Having this authority, the only way a Federal question could arise would be from an arbitrary and unreasonable abuse of that authority. The above facts clearly show, and the State Supreme Court has held as shown hereinafter, that there was no such abuse of power. Therefore, no Federal question has been raised by plaintiffs' complaint or assignment of errors.

The Supreme Court of the State of Louisiana in *State* v. *Jefferson Parish School Board*, — La. —, 19 So. (2d) 153, at pages 166 (second column) and 167 (first column), and syllabus number 3, held, relative to the case of *Cook et al.* v. *Caddo Parish School Board et al.*, No. 37,394, that:

> "In short, the court concluded that there was no invasion or deprivation of any legal right of the complainants and that the Board had acted within the scope of its power."

Therefore, in the above case, the Supreme Court of Louisiana has clearly stated its exact grounds for refusing writs in the Cook case, and this will equally apply to the Collins case when writs were refused because the identical questions were involved.

Therefore, the Supreme Court of Louisiana has held:

(1) That the local school board had full authority to pass the resolutions involved in the suits of Cook et al. v. Caddo Parish School Board and Collins et al. v. Caddo Parish School Board;

(2) That there has been no invasion or deprivation of any legal right of the complainants in either case by the passage of these resolutions; and

(3) That the Federal constitutional questions asserted were not involved.

On the above showing of the proceedings in the State courts, the 3-judge Federal Court hearing the matter held that all matters arising under the State constitution have been precluded and that the only matters left to be considered by the Federal Court were those wherein there were alleged violations of the 14th Amendment to the Constitution of the United States.

Unsubstantial Character of the Grounds Stated by Appellants Under the 14th Amendment to the United States Constitution.

That fraternities and sororities are a proper subject for school regulation is shown by the fact that twenty-three states, namely:

Arkansas	Maine	Ohio
California	Michigan	Oklahoma
Colorado	Minnesota	Oregon
Florida	Mississippi	Rhode Island
Illinois	Montana	Vermont
Indiana	Nebraska	Virginia
Iowa	New Jersey	Washington
Kansas	Louisiana	

have passed statutes which prohibit, or provide for the regulation of, high school fraternities and sororities. Out of these states litigation has been instituted by secret society members and has been carried through the state supreme courts of California, Iowa, Illinois, Michigan, Mississippi and Louisiana, and in each instance the statute was upheld, the courts holding, relative to the 14th Amendment:

Bradford v. *Board of Education* (1912) 18 Cal. App. 19, 121 Pac. 929, at pp. 932 and 933:

> "It has been held that rights and privileges granted to citizens which depend solely upon the laws of a state are not within this constitutional inhibition. • • • The system of public schools of this state is

> a state institution, and is subject to the exclusive control of the constitutional authorities of the state. • • • 'The privilege of receiving an education at the expense of the state is not one belonging to those upon whom it is conferred as citizens of the United States, and therefore, so far as the privileges and immunities clause of the fourteenth amendment is concerned, might be granted or refused to any individual or class at the pleasure of the state.' 6 Am. & Eng. Ency. of Law, p. 77."

In the above case the statute made it unlawful for any pupil to join or to become a member of

> "any secret fraternity, sorority or club, wholly or partly formed from the membership of pupils attending such public schools,"

the penalty being suspension, or if necessary expulsion.

The plaintiff invoked the *privileges and immunities* clause, class legislation, and that "it deprives a citizen of the right to attend a public school of this state."
The court said:

> "It is quite apparent to us that the younger and more immature pupils of the public schools may quite properly form a class and be made the subject of this character of legislation. • • • The statute applies equally to all of the particular class mentioned."

Steele v. *Sexton* (1931), 253 Mich. 32, 234 N. W. 436, at pp. 437, 438.

The statute in this case made it unlawful to belong to high school fraternities, etc. The school board was given power to suspend or expel, and the Act made it illegal for school officials to give a violator credits or to allow him to graduate. In attacking the statute the plaintiff invoked the due process clause, and equal protection of the law clause of the 14th Amendment of the United States Constitution.

In answer to those objections the court said:

> "It was well said in University of Mississippi v. Waugh, 105 Miss. 623, 633, 62 So. 827, 830, L. R. A. 1915D, 588. Ann. Cas. 1916E, 522: 'The fourteenth amendment to the Constitution of the United States was never intended to act as an accomplice to any young man who wanted to take advantage of the gratuitous advantages offered the youths to obtain an education, and yet refuse to obey and submit to the disciplinary regulations enacted by the Legislature for the welfare of the institutions of learning. The right to attend the educational institutions of the state is not a natural right. It is a gift of civilization, a benefaction of the law. If a person seeks to become a beneficiary of this gift, he must submit to such conditions as the law imposes as a condition precedent to this right. The act in question is not class legislation. It is quite the reverse, and seeks to destroy the possibility of the existence of any class at the educational institutions. No state or federal constitution is violated by this act in any way. Complainant is not deprived of any constitutional right, unless complainant can be said to have a constitutional right to breach the discipline of the school and set at naught the laws of the state.' "

Lee v. *Hoffman* (1918), 182 Ia. 1216, 166 N. W. 565, at page 567.

An anti-fraternity statute was attacked on the ground of arbitrary differentiation and discrimination, class legislation, and under equal protection of the laws.

The court held it valid on all counts and stated

> "The statute does not deny the equal protection of the law by making an arbitrary differentiation, even if a statute had no better standing than a mere rule (of a local school board)." (Parenthesis ours.)

Sutton v. *Board of Education* (1923), 306 Ill. 507, 138 N. E. 131, at p. 135.

The statute in this case defined a public school fraternity, sorority or secret society in the identical language of the resolution and statute under attack in the instant case, namely:

> "as one composed wholly or in part of public school pupils on the basis of the decision of its membership rather than the free choice of any pupil in the school who is qualified by the rules of the school to fill the special aim of the organization."

The penalty provided was suspension or expulsion. The court, at page 133, reviewed cases arising under anti-fraternity society *rules* adopted by boards of education, and stated:

"Every question raised in this case has been previously adjudicated by the courts of this and other states."

The court discussed and approved *Bradford* v. *Board of Education*, 18 Cal. App. 19, 121 Pac. 929; *University of Mississippi* v. *Waugh*, 105 Miss. 623, 62 So. 827, 239 U. S. 589, 35 Sp. Ct. 720, 59 L. Ed. 1131, and then said:

> "Appellant was given his choice between suspension or expulsion, and severing his connection with the Greek letter society while a pupil in the public school. If he had complied with the requirements of the law and the rule of the board, his continued attendance at the public school would not have been interfered with."

In No Case that we have been able to find has a court of final authority failed to uphold the validity of a statute regulating secret societies.

In the following cases it was so well settled that local school boards had the authority to pass rules and regula-

tions governing secret societies, that *no constitutional questions were raised or discussed:*

Wayland v. *School Directors* (1906), 43 Wash. 441, 7 L. R. A. (N. S.) 352, 86 Pac. 642;
Wilson v. *Board of Education* (1908), 233 Ill. 464, 84 N. E. 697;
Favorite v. *Board of Education* (1908), 235 Ill. 315, 85 N. E. 402;
Smith v. *Board of Education* (1913), 182 Ill. App. 342;
Antell v. *Stokes* (1934), 191 N. E. 407 (Mass.).

The Foregoing Jurisprudence Has Long Been Approved by the United States Supreme Court and is the Fixed and Settled Jurisprudence of Both State and Federal Courts.

In the following case, which the 3-judge court from which this appeal is taken found to be *entirely analogous* with the case at bar:

University of Mississippi v. *Waugh* (1915), 105 Miss. 623, 62 So. 827, 237 U. S. 589, 59 L. Ed. 1131

and which is thoroughly discussed in the opinion of the lower court (see copy of opinion rendered by 3-judge court attached to plaintiffs' amended jurisdictional statement), it was specifically held that the statute Did Not Violate the Due Process Clause of the 14th Amendment or the Equal Protection of the Laws Clause or the Privileges and Immunities guaranteed by the United States Constitution, the court further stating (59 L. Ed. at p. 1137):

> "It is very trite to say that the right to pursue happiness and exercise rights and liberty are subject in some degree to the limitations of the law, and the condition upon which the State of Mississippi offers the complainant free instruction in its university, that while a student there he renounce affiliation with a

> society which the state considers inimical to discipline, finds no prohibition in the 14th Amendment."

We particularly call the Court's attention to the fact that in the *Waugh* case as reported in 59 L. Ed. page 1131, the briefs of the complainant there digested show that All of the Attacks Made by the Complainants in This Case were made in that case without avail. The *Waugh* case covers a situation in which even *broader authority* was delegated than in the case at bar. In the *Waugh* case the Board of Trustees were given the authority *to permit* present members of the fraternity to continue their fraternal membership so long as they conducted themselves properly. Even the authority given the Board of Trustees in making these further discriminations was upheld. In the case at bar no student is given any preference over any other student in any way. They are all placed on identically the same footing.

Accordingly, inasmuch as the rights asserted by the plaintiffs in this case are not granted to them by the Constitution of the United States as citizens of the United States, then no Federal question is involved; and since all grounds of attack and all matters urged in this case have been completely settled by the jurisprudence of the Supreme Court of the United States as set forth in the *Waugh* case, *supra,* as well as the jurisprudence of the courts of last resort throughout the country, as shown above, then the matter is foreclosed and the complaint is lacking in substantiality.

It has been consistently held by the United States Supreme Court that:

> The privileges and immunities protected by the 14th Amendment are only those that belong to citizens of the United States as distinguished from citizens of the States—those that arise from the Constitution and

laws of the United States as contrasted from those that spring from other sources.

In discussing the *Slaughter-House cases*, 16 Wall. 36, 72-74, 77-80, 21 L. Ed. 394, 407-410, the court said in 30 Fed. Cases, No. 18,260:

> "The great body of our civil and political rights, that of acquiring and enjoying property, real and personal, to exercise trades, *ATTEND SCHOOLS* and churches, to be protected against personal violence and enjoy the freedom of opinion, were declared to *REST ENTIRELY UNDER STATE PROTECTION* and were not included in this Amendment (14th Amendment)." (Capitalization, underscoring and parenthesis ours.)

See also:

McPherson v. *Blacker*, 146 U. S. 1, 38, 36 L. Ed. 869, 878;

Duncan v. *Missouri*, 152 U. S. 377, 382, 38 L. Ed. 485, 487;

Twining v. *New Jersey*, 211 U. S. 78, 97, 52 L. Ed. 97, 105;

Maxwell v. *Bugbee*, 250 U. S. 525, 538, 63 L. Ed. 1124-1130;

Prudential Ins. Co. v. *Cheek*, 259 U. S. 530, 539, 66 L. Ed. 1044, 1052;

Snowden v. *Hughes*, 88 L. Ed. 347, 64 S. Ct. 397.

Moreover, even where there is a direct right set up in the Federal Constitution, such as the PROTECTION OF RELIGIOUS LIBERTY, this has been held subservient to the right of a state to regulate the requirements of its own school system, and the necessity that a prospective pupil must conform thereto has been consistently upheld by this Court; and thus

in *University of Maryland* v. *Coale*, (1933), 165 Md. 224, 167 A. 54, 290 U. S. 597, 78 L. Ed. 525,

> The Court decided against the contention of a student in the University of Maryland who on conscien-

tious grounds objected to military training there required. His appeal to this Court was dismissed for want of a substantial Federal question.

The report of this Per Curiam opinion in 78 L. Ed. 525 shows that in dismissing the appeal for want of a substantial Federal question, the Court cited, among other cases, *Waugh* v. *University of Mississippi*, 237 U. S. 589, etc.

Counsel for plaintiffs, in arguing the matter of Federal jurisdiction, attempted to differentiate the *Waugh* case from the case at bar on the ground that Louisiana has a compulsory education statute.

We call the Court's attention to the fact that the statute referred to *does not require* the plaintiffs' children to be sent to *any public school.*

Citing from *Act 239 of 1944:*

"Be it enacted by the Legislature of Louisiana, That every parent, etc. * * * shall send such child or children to a public *or PRIVATE DAY SCHOOL* * * *." (Underscoring and capitalization ours.)

We contend that this statute has no effect whatever on the present case because it is clear that parents have the choice of complying with the regulations under which a free public education is offered their children by the State of Louisiana, and if they do not choose to comply with these regulations, then they are free to send their children to any private school that they see fit, there being ample accommodations provided in private high schools in Shreveport, Louisiana, where complainants' children reside.

WHEREFORE, appellees respectfully submit this statement showing that the questions upon which the decision of this cause depends are so unsubstantial as not to need further argument, and appellees respectfully move the Court to dismiss this appeal at costs of appellants, or, in the alterna-

tive, to affirm the unanimous decision entered by the Honorable Three-Judge Court assembled to hear this complaint, sustaining the Motion and Supplemental Motion of Lack of Jurisdiction Over the Subject Matter and dismissing the suit of plaintiffs-appellants at their costs.

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